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IN THE

Supreme Court of the United States

October Term, 1960

No. .....

DONALD L. GRABLE, as Administrator with the Will Annexed of the Estate of SIDNEY L. BEACH, also known as S. L. BEACH and SIDNEY BEACH, deceased, substituted as party plaintiff in the place and stead of SIDNEY L. BEACH,

Plaintiff and Appellant,

vs.

G. W. GRABLE and LOUISE GRABLE, etc.,

Defendants, Cross-Complainants, and Appellants,

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF RIVERSIDE, CALIFORNIA,

Respondents,

and

THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE SECOND APPELLATE DISTRICT,

Appellees.

Petition for Writ of Certiorari.

GILBERT GRABLE,
Trustee,
LOUISE GRABLE,
Trustee,
DONALD L. GRABLE,
Administrator.
4510 Rutile Street,
Riverside, California,
In Pro. Per.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Respondents,

and

THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE SECOND APPELLATE DISTRICT,

Appellees.

MOTION FOR PERMISSION TO FILE WRIT OF CERTIORARI.

To the Honorable Earl Warren, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

The petitioners, Gilbert Grable, Louise Grable and Donald Grable, move the court for permission to file their Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division Two.

GILBERT GRABLE
In Pro. Per.

PETITION FOR WRIT OF CERTIORARI.

Petitioners, Gilbert Grable, Louise Grable and Donald Grable, pray that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, entered on April 26, 1960 [Cert. Rec. Opinion Second District Court of Appeal, p. 1, Appendix to Petition for Hearing in the Supreme Court of the State of California; Appendix A hereto, p. 1] whereby judgment of the Superior Court of the State of California in and for the County of Los Angeles was affirmed.

Opinions Below.

The opinion of the court below, District Court of Appeal of the State of California, in and for the Second Appellate District, affirming the judgment of the Superior Court of the State of California in and for the County of Los Angeles was filed April 26, 1960 [Cert. Rec., Opinion of Second District Court of Appeal, p. 1; Appendix A, p. 1.] Reported in 180 Adv. Cal. App. 2, p. 361.

A petition for rehearing in the District Court of Appeal on the opinion sustaining the judgments against your petitioners was denied May 13, 1960, 180 Advanced California Appellate Reports, Number 5, in the minutes thereof at page 3. A petition filed in the Supreme Court of the State of California seeking a hearing, was denied June 22, 1960, 54 Advanced California Reports, Number 11, in the minutes thereof at page 3.

Jurisdiction.

The judgment of the Second District Court of Appeal was entered April 20, 1960 [Cert. Rec. Opinion Second District Court of Appeal, p. 1, Appendix to Petition for Hearing in the Supreme Court of the State of California; Appendix A hereto, p. 1.] (180 Adv. Cal. App. 2, p. 361.)

A petition for rehearing was denied on May 13, 1960. [Cert. Rec., Order of Denial, 180 Adv. Cal. App. Rep. No. 5, in the minutes thereof at p. 3.]

A petition for Hearing in the Supreme Court of the State of California was denied on June 22, 1960 [Cert. Rec., Order of Denial; Adv. Cal. Rep. No. 11, in the minutes thereof, at p. 3.]

The Constitutional issues here presented were urged in the lower court. The jurisdiction of this court is invoked under Section 1257(3) of the Judicial Code, as amended.

Questions Presented.

1. Was there a denial of due process of law due to lack of jurisdiction in the District Court of Appeal to relitigate the right of Beach, determined in an action of which respondents had undenied actual knowledge and full opportunity to have joined the action or appealed therefrom, to have restitution of trust property resulting from the declared invalidity of the Sidney L. Beach Trust, said issue having been adjudicated in *Beach v. Grable*, in a declaratory judgment filed with the court on November 3, 1953 [Clk. Tr. Cert. Rec. pp. 52-53; Appendix C hereto] and entered in the permanent minutes of the court on November 5, 1953 [Clk.

Tr. Cert. Rec. p. 51; Appendix D hereto] and final and conclusive for want of appeal?

2. Was there a denial of due process of law caused by the filing of an opinion (Appendix A hereto) purporting to decide and adjudicate for the respondents against Beach the same identical issue of Beach's right to have restitution of his property previously determined in favor of Beach in a judgment and order conclusive as to that issue for want of appeal? [Cert. Rec., Clk. Tr. pp. 51, 52, 53; Appendices C and D cited above.]

3. Was there a denial of due process of law in that the judgment is contrary to the laws of the State of California contained in the statutes of the Code of Civil Procedure of the State of California, numbered 1060, 1061, 1062, 1908, and in the cases cited in *Ideal Hardware Etc. Co. v. Dept. of Employment*, 114 Cal. App. 2d 443, 250 P. 2d 353, and, others cited in petitioner's briefs submitted to the District Court of Appeal and the Supreme Court of the State of California? [Cert. Rec.]

4. Was there a denial of due process of law and the equal protection of law by the radical departure from the accepted and usual course of judicial proceedings by the trial court, which has been sanctioned and expanded by the District Court? [Cert. Rec., Clk. Tr. pp. 207, 208, and 209, Letter of decision by trial court; Appendix A Second District Court Opinion, p. 7.]

5. Was there a denial of due process of law by the refusal of the Supreme Court of the State of California to rule on the issue, raised by the two final judgments *diametrically opposed in findings and the adjudication* of the identical issue of Beach's right to

restitution of trust property? [54 Adv. Cal. Rep. No. 11, p. 3; Order denying petition for hearing in Supreme Court of the State of California, Cert. Rec.]

The Questions Sought to Be Reviewed Arise Under the Constitutional Provisions, and Statutes, Which the Case Involves, as Follows:

Fourteenth Amendment, Section 1 of the Constitution of the United States; U. S. C. A. Constitutional Amendments 14 to end, Part III, at page 2:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U. S. C. A. Section 1652, page 110:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

Under the above section 1652, the California Statutes which apply to this case are as follows:

Section 1060, Deering's California Codes Annotated, Code of Civil Procedure, Sections 1060 to 1236, page 1:

"Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a water course, may in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the Superior Court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

Section 1061, Deering's California Codes Annotated, Code of Civil Procedure, Sections 1060 to 1236, page 53:

"The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all circumstances."

Section 1062, Deering's California Codes Annotated, Code of Civil Procedure, Sections 1060 to 1236, page 61:

"The remedies provided by this chapter are cumulative, and shall not be construed as restricting

any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based on the same facts."

Section 1908, Deering's California Code of Civil Procedure (1953), page 741; Deering's California Codes Annotated, Code of Civil Procedure, Sections 1858 to 1915, page 625:

"The effect of a judgment or final order in an action or special proceeding before a court or judge of this state or the United States having jurisdiction to pronounce a judgment or order, is as follows:

"1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment, or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.

"2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

Statement of the Case.

The Superior Court of the State of California, in and for the County of Los Angeles, in Civil Action 600,136, entitled Beach v. Grable [Cert. Rec. Clk. Tr. pp. 1-20], after a trial on the merits of the action for declaratory relief, brought pursuant to the above declaratory statutes of the California Code of Civil Procedure, filed on November 3, 1953, a judgment with the clerk of said court, which was entered in the permanent minutes of the court on November 5, 1953, Holding the trust involved void and ordering the dissolution of the trust and an accounting for the benefit of the grantor of the void trust, Sidney L. Beach; no appeal was taken from the judgment. [Cert. Rec. Clk. Tr. pp. 52, 53 and 51; Appendices C and D hereto.]

Thereafter, in 1954, an action was filed in the Superior Court of the State of California, in and for the County of San Bernardino, entitled *Burns v. Grable*, seeking to quiet title in Burns against the trustees and the grantor of the Beach Trust to a piece of real property belonging to Sidney L. Beach and purchased by Burns from the trustees pursuant to their supposed authority under the terms of the theit adjudicated void trust. (Appendix B, herewith.) [Appendix to Op. Br. in Second District Court of Appeal, Cert. Rec.] The Federal issue was raised in the trial court in *Burns v. Grable*, by the pleadings and by motions to abate. [Appendix B, pp. 2, 3, 4, 5, 6, 7 and 8; Opinion 4th District Court of Appeal, Cert. Rec.]

Trial was had on the merits and the court found for Burns, without reference to the judgment or the trust. An appeal was filed and the Fourth District Court of

Appeal, ignoring the final judgment had in the Los Angeles court, filed an opinion (Appendix B herewith), purporting to relitigate the same identical issue (Beach's right to restitution of trust property), decided by the declaratory judgment had in *Beach v. Grable*. [Cert. Rec. pp. 52-53 and 51, Appendices C and D herewith.]

Petitioners in that action challenged the jurisdiction of the 4th District Court of Appeal to render the judgment made, without success. [Appendix B herewith; Opinion 4th District Court of Appeal, Cert. Rec.]

The filing of the *Grable v. Grable* action in the Los Angeles Court for the purpose of executing the order of the court to dissolve the trust and account to Beach was based on the belief that the judgment in *Beach v. Grable* was a final and conclusive judgment and that the Fourth District Court of Appeal was without jurisdiction to relitigate the issue of Beach's right to restoration of the trust property decided in the *Beach v. Grable* judgment, and therefore the ruling of the Fourth District Court of Appeal was void.

The issue of due process of law was raised in the trial court in *Grable v. Grable* by stipulation that the court should determine which of the two judgments, the *Beach v. Grable* judgment or the judgment in *Burns v. Grable*, was the final judgment of Beach's right to restitution of trust property. This was the only issue carried into the appellate court. [Cert. Rec. Clk. Tr., Finds. of Fact and Concl. of Law, pages 235, 236 and 237.] (Appendix A, Second District Court of Appeal, Opinion, pages 8 and 9.) [Cert. Rec. Clk. Tr. p. 268, lines 24-30, Letter of Decision.]

The trial court in *Grable v. Grable*, adopted the ruling made in *Burns v. Grable*, and denied the judgment had in *Beach v. Grable*. [Cert. Rec. Clk. Tr. pp. 308-319.]

The Second District Court of Appeal sustained the trial court. (Appendix A hereto.) [Cert. Rec., Clk. Tr. pp. 308-319, and pp. 235-253.]

The petition for a rehearing in the District Court was denied and a petition to the Supreme Court for a hearing was also denied. [Cert. Rec. Orders of Denial.]

The Federal issue of denial of due process of law, and of the equal protection of the law, was urged upon all the courts without avail, and the only issue before the court on this appeal is the issue as to the status of the judgments as final determinations of Beach's right to restitution of trust property; and, is the final order of the court in *Beach v. Grable* to be dismissed by any judge at the insistence of private parties without first establishing its invalidty for fraud or lack of jurisdiction.

In the *Burns v. Grable* case, the opinion of the 4th District Court of Appeal herein referred to as the Burns Opinion (Appendix B herewith) relied on by respondents, and the court, to establish the right of respondents over Beach to the trust property was based on the relitigation of the issue decided in *Beach v. Grable*. The issue of the constitutional right of Beach to have restitution of the trust property determined by the judgment in *Beach v. Grable* was raised in the pleadings by these petitioners, and admitted by the failure to deny by the plaintiff Burns.

At page 2 of the Opinion in the *Burns v. Grable* case (Appendix B herewith), Paragraph 1 and 2 summarize the pleadings by these petitioners, wherein they alleged by way of cross-complaint the invalidity of the trust and the right of Beach to have restitution of the trust property. At page 3, paragraph 1, the plaintiffs Burns in their answer to the above referred to cross complaints do not deny the allegation of Beach's right but claim estoppel as a defense.

At paragraph 2 of page 3, of the Burns Opinion, it shows the denial of the motion for a judgment on the pleadings. That on December 29, 1954, G. W. Grable filed an affidavit in support of his oral motion to abate the action based on the judgment had in *Beach v. Grable*. At page 13, paragraph 2 of the *Burns* Opinion, it shows that the trial court did not rule on the oral motion to abate the action above referred to.

At page 4 of the *Burns* Opinion, it is stated that after the plaintiff rested his case these petitioners relied completely on the final judgment in the *Beach v. Grable* case to establish lack of jurisdiction in the court to relitigate Beach's right to have restitution of the trust property.

At page 10 of the *Burns* Opinion, the court states that:

> "It does not affirmatively appear that the ruling of the trial court in the Los Angeles action became a final judgment disposing of the claim here presented. * * *."

At pages 3-4 of the *Burns* Opinion the court grossly misquotes the judgment had in the Los Angeles action

In *Grable v. Grable* the issue before the trial court by stipulation of the parties was the question as to which of two final judgments was valid and which invalid. At pages 8, 9 and 10, the Second District Court states in the Opinion (Appendix A hereto) as follows:

> "As indicated in the aforestated summary, the only essential questions presented on this appeal are:
>
> "(a) Whether the said 1953 ruling and minute order constitute a final and conclusive judgment binding on the transferee defendants that the trust was invalid; and (b) Whether the decision in *Burns v. Grable* was *res adjudicata* as to the validity of the trust insofar as the power and right of the trustees to have made the sales and transfers herein to the transferee defendants (respondents) is concerned. It is obvious on the one hand that, if the 1953 ruling and minute order constituted a final judgment binding on the transferee defendants that the trust was invalid and conferred no power of sale in the trustees, the sales and conveyances to the transferee defendants would likewise be invalid, unless plaintiff and the defendant trustee should perhaps be estopped from questioning the transfer. It is equally obvious on the other hand that if the decision in *Burns v. Grable* conclusively establishes and determines that the said trust is valid insofar as the power and right of the trustees to make sales and conveyances is concerned and it is *res judicata* here, the judgment in favor of the transferee defendants must be affirmed. * * *

> "The contention that the said 1953 ruling and minute order constituted a final judgment binding on the transferee defendants and determined the invalidity of the trust is entirely without merit. * * *."

The court is directed to the Certified Record and to the briefs therein submitted by the petitioners for further evidence of the complete notice given to all the courts involved as to the presence of the Federal questions here presented to this court.

ARGUMENT.

The judgment of the courts below should be reversed for the following reasons.

I.

Declaratory Judgments.

Declaratory Judgments are final judgments as to the issues there determined.

Calif. Code Civ. Proc., Sec. 1060;

Calif. Code Civ. Proc., Sec. 1908-1.

Gutensohn v. Kansas City Southern Ry. Co., 140 F. 2d 950:

> "A 'Declaratory Judgment' or decree is one which simply declares the rights of the parties or expresses the court's opinion on a question of law without ordering anything to be done, *its distinctive characteristic being that declaration stands by itself and no executory processes follow as of course.*" (Emphasis ours.)

II.
Declaratory Actions to Determine Status Are In Rem.

Declaratory judgments to determine status only, of things, or, of rights of persons to have restitution of property, are actions *in rem*.

Gridley v. Boggs, 62 Cal. 190 at p. 201:

"Public policy only requires, at most, that a judgment as to the status of a particular person, *which shall be conclusive as against those not parties to it*, shall be a judgment which simply determines such status *in a proceeding whose sole end and aim it is to determine it*." (Emphasis ours.) (Quote taken from page 18 of Reply Brief in Second District Court of Appeal.)

Frost v. Witter, 132 Cal. 421 at page 426:

"* * * there is a distinction between actions brought for recovery of damages or compensation and *those brought for restitution,—the latter constituting actions in rem*, and the former actions in personam—" (Emphasis ours.) (Quote taken from page 7 of Petition for Hearing in the Supreme Court of the State of California.)

III.
Account Order Is Final.

The court order to dissolve the trust and account to Beach, was a final determination of Beach's constitutional right to have restitution of trust property, and cannot be withdrawn by the court at the insistence of private parties.

In 257 F. 2d 33 at p. 40, Judge Martin C. Matthes, of the Eight Circuit Court of Appeals in the hearing

on Judge Lemley's decision on the Central High School integration order at Little Rock, Arkansas, stated, quote:

> "The issue plainly comes down to the question of whether overt public resistance, including mob protest, constitutes sufficient cause to nullify an order of the Federal Court directing the (school) board to proceed with it's integration plan. *We say that the time has not yet come in these United States when an order of a Federal Court must be whittled away, watered down or shamefully withdrawn, in the face of violent and unlawful acts of individual citizens in opposition thereto.*" (Emphasis by the court.) (Quote taken from Petition for Rehearing in the Second District Court of Appeal, pp. 11-12.)

IV.

Rights Once Finally Adjudicated Cannot Be Again Litigated.

Ideal Hardware Etc. Co. v. Dept. of Employment, 114 Cal. App. 2d 443 at pp. 448-449; 250 P. 2d 353:

> "*It is the title, right or obligation sought to be established* or enforced, not the remedy or the relief sought, *which determines the nature and substance of the cause of action. When this has once been adjudicated, it cannot be relitigated upon any grounds that were or that could have been determined in the former action.* (Cases cited.)" (Emphasis ours.) (Quote taken from Petition for Hearing in the Supreme Court of the State of California, at p. 10.)

V.

The Right to Due Process of Law.

It is fundamental to the doctrine of due process that no court shall deprive any party of a substantive right *arbitrarily* or *capriciously*. This court has been zealous in examining the records of litigation carried on in state courts where there is a showing that a reasonable basis exists for supposing that rights guaranteed by the Federal Constitution have been denied or ignored.

Dixon v. Duffy, 344 U. S. 143, 145 (1952); in *Craig v. Harney*, 331 U. S. 367, 373 (1946). This court said:

> "In a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution, an independent examination of the facts by this court is often required to be made. (Citations.)"

Conclusion.

Wherefore, your petitioners pray:

That this court issue a Writ of Certiorari to the District Court of Appeal of the State of California in and for the Second Appellate District, and that the judgment be reversed, to the end that these petitioners may have the judgment in the action here submitted for review to be held void for lack of jurisdiction in the court to relitigate the issue of the trust invalidity, and of *Beach's right to restitution of trust property*.

That the decision and order in *Beach v. Grable* be found a final adjudication of the trust invalidity and of Beach's right to an accounting.

That the rights of the petitioners under the Constitution of the United States shall be enforced and the ends of justice met.

Respectfully submitted,

GILBERT GRABLE,
Trustee,

LOUISE GRABLE,
Trustee,

DONALD L. GRABLE,
Administrator.

In Pro. Per.

APPENDIX A.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

Donald L. Grable, as Administrator with the Will Annexed of the Estate of Sidney Beach, also known as S. L. Beach and Sidney Beach, deceased, substituted as party plaintiff in the place and stead of the deceased Sidney L. Beach, Plaintiff and Appellant, vs. G. W. Grable, *et al.* Defendants.

G. W. Grable and Louise Grable, individually and as Trustees of the Sidney L. Beach Trust, Defendants-Cross-complainants-Appellants, vs. Citizens' National Trust & Savings Bank of Riverside, California, Security Title Insurance Company, F. L. Burns and Laura B. Burns, Mono Power Company, Otto Schmitz, Hirsh Development Corporation, and The Ranchito School District of Los Angeles County, Respondents.

Appeal from judgment of the Superior Court of Los Angeles County, Fletcher Bowron, Judge. Affirmed.

For Appellant Donald L. Grable: Russell H. Reay.

For Appellants G. W. Grable and Louise Grable: In Propria Persona.

For Respondents Citizens' National Trust and Savings Bank of Riverside, California, Security Title Insurance Company, F. L. Burns and Laura Burns, and Mono Power Company: F. W. Audrain and Jack M. Lasky.

For Respondents Otto Schmitz and Hirsh Development Corporation: O'Melveny & Myers, Sidney H. Wall and Rodney K. Potter.

For Respondent Ranchito School District of Los Angeles County: Harold W. Kennedy, County Counsel.

Robert A. Von Esch, Jr., Deputy County Counsel, and O'Melveny & Myers, Sidney H. Wall and Rodney K. Potter.

Plaintiff as administrator of the estate of the deceased trustor under a declaration of trust, and defendants and cross-complainants, G. W. Grable and Louise Grable, individually and as trustees under said declaration of trust, separately appeal from a judgment declaring and decreeing that respondents (defendants to whom the trustees sold and transferred various properties of the trust and sometimes hereinafter referred to as the transferee defendants) have no duties no reliabilities to plaintiff or to the defendant trustees with respect to properties of the trust sold and conveyed to them by the defendant trustees; and that neither plaintiff nor the defendant trustees have any right to or interest in said properties.

The pertinent facts, insofar as relate to the judgment rendered herein in favor of respondents from which the appeals have been taken, are the following.[1]

Sidney L. Beach during his lifetime in 1949 transferred certain properties to G. W. Grable and Louise Grable, as trustees pursuant to and for the purposes set forth in a declaration of trust. The respondents herein, as previously alluded to, are purchasers for value to whom the trustees later sold and conveyed certain properties of the trust.

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[1]It is unnecessary to review the facts relative to the controversy inter se between plaintiff and the trustees-beneficiaries of the trust, since the judgment only adjudicated the controversy between plaintiff and the trustees-beneficiaries on the one hand and the respondents on the other hand and since jurisdiction was expressly reserved for the purpose of later determining the respective rights of plaintiff and of the trustees-beneficiaries inter se.

In 1952, said Beach commenced this action for the purpose of having the said trust declared invalid and of having the rights, duties and liabilities of the parties thereto (*i.e.*, the trustees, beneficiaries and himself) declared and determined.[2] The essence of his complaint was that said trust violated the rule against perpetuities and also the prohibitions against restraints on alienation and was, therefore, invalid and void.

In the original complaint, the trustees and beneficiaries were the defendants. The original complaint made no mention of sales by the trustees of trust property; nor did it name or make as parties defendant any of the persons to whom the trustees had sold and transferred properties of the trust.

Answer and cross-complaint were filed by the trustees and certain of the beneficiaries; and Beach demurred to said cross-complaint.

On the hearing of said demurrer in 1953 (which was prior to the time when the transferee defendants [respondents] were made parties to the action), the trial court sustained the demurrer to said cross-complaint; and, in its "Memo of Ruling" and "Minute Order," it stated: "On the issue heretofore submitted, *the court is now prepared to hold* that the trust involved is invalid for the reason that it violates the rule against perpetuities. The trust will therefore be dissolved and defendant trustees ordered to make accounting. The matter of the accounting and further proceedings will be set for hearing at the convenience of counsel or upon five days notice." (Emphasis added.)

---

[2] After Beach's death, the present plaintiff as administrator of Beach's estate, was duly substituted as party plaintiff in the action in his place and stead.

Also in the interim before the transferee defendants (respondents) were made parties to the action at bar, another action involving the validity of the identical trust was instituted by one Burns, et ux., in the Superior Court of the County of San Bernardino for the purpose of quieting the title to certain real property which had been conveyed to Burns, *et ux.*, by G. W. Grable and Louise Grable as trustees of said Beach trust. In said action, *Burns et ux.* (two of the transferee defendants herein) were the plaintiffs; and Donald L. Grable, as administrator (plaintiff herein) and G. W. Grable and Louise Grable (the defendant trustees herein) were the defendants.

Said action was titled *Burns v. Grable*, and the decision therein on appeal is reported in 138 Cal. App. 2d 280. As hereinafter further explained, the transferee defendants (respondents) contended below, and the trial court found, that the decision on appeal in *Burns v. Grable* was *res judicata* against plaintiff and the defendant trustees as to the validity of the trust insofar as the power and right of the trustees to make the sales and transfers to the transferee defendants is concerned. *Burns v. Grable* and the respective contentions as to whether or not it is *res judicata* will be considered more fully hereinafter.

Subsequent to the aforestated interim developments, plaintiff filed an amended and supplemental complaint in this action wherein he joined and made the transferees of the trustees (respondents) parties defendant for

the first time and wherein he also sought to have declared void the conveyances of properties made to the transferee defendants by the trustees.

Answer thereto and cross-complaint were filed by the trustees wherein they alleged *inter alia* that the aforesaid "Memo of Ruling" and "Minute Order" of 1953 was a final judgment adjudging the invalidity of the trust. Further, answers were filed by the transferee defendants (respondents), and in some instances certain of said transferee defendants cross-complained to quiet title. The answers of the transferee defendants raised various and differing affirmative defenses; but all of said answers raised as an affirmative defense the claim that the decision on appeal in *Burns v. Grable* is *res judicata* in this action.

Subsequently, the parties stipulated that, at the trial, the issue as to whether the 1953 "Memo of Ruling" and "Minute Order" constituted a binding final and conclusive determination of the invalidity of the trust and the issue as to whether the decision in *Burns v. Grable* was *res judicata*, should be submitted and determined prior to the presentation of evidence relative to any other issues presented by the pleadings.

Later and after the trial judge had indicated by letter to counsel that he was of opinion that the 1953 memo of ruling and minute order were not final or binding and that the decision in *Burns v. Grable* was *res judicata*, the parties entered into and filed a supplemental stipulation of facts setting forth all additional

facts which were necessary to enable the trial court to adjudicate all issues between appellants and respondents and to render final judgment in the action insofar as the respective rights between appellants and respondents were concerned.[3]

Thereupon the trial court made its findings of fact and conclusions of law and rendered judgment as aforestated in favor of the transferee defendants, the respondents herein. The trial court in essence found and concluded, insofar as is material on this appeal, that the 1953 ruling and minute order did not constitute a final judgment and did not adjudicate the invalidity of the trust or any matter insofar as the transferee defendants (respondents) are concerned; and that the decision in *Purvis v. Grable* was *res judicata* against plaintiff and the defendant trustees as to the validity of the trust insofar as the power and right of the trustees to have made the sales and transfers herein to the transferee defendants (respondents) is concerned.

Judgment was accordingly rendered that the transferee defendants (respondents) had no duties or liabilities to plaintiff or to the defendant trustees; and that neither plaintiff nor the defendant trustees had any right to or interest in the properties sold and conveyed by the trustees to the respondent transferee defendants.

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[3] Appellants' incidental contention that the trial court should not have proceeded to render judgment without further trial is therefore devoid of merit. It clearly appears from their aforestated actions and from the filing of the supplemental stipulation of facts that appellants and respondents submitted all issues between them inter se for final determination by the trial court, and that the only controversy requiring further trial was that between plaintiff and the trustee beneficiaries as to which the trial court reserved and retained jurisdiction.

As indicated in the aforestated summary, the only essential questions presented on this appeal are: (a) whether the said 1953 ruling and minute order constituted a final and conclusive judgment binding on the transferee defendants that the trust was invalid; and (b) whether the decision in *Burns v. Grable* was *res judicata* as to the validity of the trust insofar as the power and right of the trustees to have made the sales and transfers herein to the transferee defendants (respondents) is concerned.

It is obvious on the one hand that, if the 1953 ruling and minute order constituted a final judgment binding on the transferee defendants that the trust was invalid and conferred no power of sale in the trustees, the sales and conveyances to the transferee defendants would likewise be invalid, unless plaintiff and the defendant trustees should perhaps be estopped from questioning the transfer. It is equally obvious on the other hand that, if the decision in *Burns v. Grable* conclusively establishes and determines that the said trust is valid insofar as the power and right of the trustees to make sales and conveyances is concerned, and if it is *res judicata* herein, the judgment in favor of the transferee defendants must be affirmed, since appellants' appeals are based on the premise that the conveyances were invalid because the trust was invalid and since the stipulations of facts establish that the transferee defendants were *bona fide* purchasers for value.

The contention that the said 1953 ruling and minute order constituted a final judgment binding on the transferee defendants and determined the invalidity of the trust is entirely without merit.

First, the language used (*i.e.*, ". . . the court is now prepared to hold that the trust involved is invalid . . .")

evidences on its face that the ruling and order was not intended to be, and was not, a final judgment. In considering similar contention in *Grable v. Citizens Nat. Trust & Sav. Bank*, 104 Cal. App. 2d 710, 714, the appellate court therein stated: "The minute order declaring that the judge . . . was 'prepared to hold that the trust involved is invalid' was not a final order or judgment. . . . The doctrine of *res adjudicata* is applicable only to issues which have been determined by final order or judgment. [Citation.] . . . An opinion of the judge, or an order for judgment is not a judgment. . [Citations.] The minute order under consideration merely indicated the court's intention to find that the trust was invalid and to proceed with the action accordingly. It was not a final judgment. . . ."

Secondly, said ruling and minute order, in any event, cannot be considered as binding or conclusive against the transferee defendants (respondents), since they were not parties to the action when said ruling and minute order were made as hereinbefore shown. It is fundamental that an order or judgment is only *res judicata* as to the person against whom the doctrine is asserted where such person was a party to the action in which the order or judgment was made (*Bernhard v. Bank of America*, 19 Cal. 2d 807, 810-811; *Grable v. Citizens Nat. Trust & Sav. Bank*, *supra*); and it is self-evident that a person cannot be considered to have been a party to an action at a time before he was named or made a party thereto. It is, therefore, inescapable that the said 1953 ruling and order, made at a time when the transferee defendants were not parties to the action, cannot be *res judicata* against said transferee defendants or binding on them.

Appellants' further contention that the decision in *Burns v. Grable* was not *res judicata* against them as to the validity of the trust insofar as the power and right of the trustees to have made the sales and transfers to the transferee defendants herein, is equally untenable.

The circumstance that the respondents (other than *Burns et ux.*) were not parties to *Burns v. Grable* is of no moment. Plaintiff and the defendant trustees were parties thereto; and, as held in *Bernhard v. Bank of America, supra*, 19 Cal. 2d 807, 811-812: "The criteria for determining who may assert a plea of *res judicata* differ fundamentally from the criteria for determining against who a plea of *res judicata* may be asserted. . . . There is no compelling reason, however, for requiring that the party asserting the plea of *res judicata* must have been a party, . . . to the earlier litigation."

It is also settled that the decision of an appellate court (*i.e.* the decision on appeal in *Burns v. Grable, supra*, 138 Cal. App. 2d 280) falls within the purview of the doctrine of *res judicata* and is conclusive of the issues and matters determined by the appellate court. (*Phillips v. Patterson*, 34 Cal. App. 2d 481, 485; *Lake v. Bonynge*, 101 Cal. 120, 127.) Further, it is also established that, where a decision is based on several alternative grounds (as the decision on appeal in *Burns v. Grable, supra*, was based), each said ground on which the decision is based is *res judicata*. (*Evans v. Horton*, 115 Cal. App. 2d 281, 285, 286.)

Proceeding to a direct consideration of the decision on appeal in *Burns v. Grable, supra*, 138 Cal. App. 2d 280, examination thereof shows that the appellate court

therein, among other matters, held that the trustees had the power and right to sell and convey properties of the trust under the severable provisions of a valid interim spendthrift trust created by the declaration of trust.

In *Burns v. Grable*, *the trustees sold and conveyed* to *Burns et ux.* certain real property which the trustees had acquired in San Bernardino County after the creation of the trust. The issues raised were essentially the same as in the case at bar, namely: whether the trust was valid, and whether the trustees had power and right to sell and convey properties of the trust.

The following portion of the appellate court's decision (which appears at pages 287-288 of its opinion reported in volume 138 Cal. App. Reports, 2d Series) alone makes it manifest that it was determined therein that the trustees were invested with full power and right to make sales and conveyances during the 25-year term of a severable, valid interim trust estate created by the declaration of trust, even though the declaration of trust may possibly have created a remainder violative of the rule against perpetuities. The appellate court stated:

"There are many California cases upholding the validity of interim or prior estates regardless of the invalidity of future dispositions. They bear particularly around the fact of the spendthrift character of the trust and the courts generally find that the valid portions will be disturbed only if the elimination of the invalid provision will defeat the entire purpose of the trust. [Citations.] The facts here reveal and these cases support the proposition that the Sidney L. Beach trust was, in any event, valid at the time of the execution of the grant deed in question. It authorized the trustees, for the 25-year term, to buy and sell real property for the pur-

pose of building up the trust, and in carrying out the spendthrift trust income provisions which are severable from the future disposition clauses. The profit from the sale of the property here in question became an interim estate of the trust and was distributable under its provisions which, at the time, were considered valid by all parties. The invalidity, if any, was discovered later and consisted of certain separable provisions in reference to the distribution of the remainder upon the happening of certain events or failure of such events to happen, and these claimed invalidities were not discovered by the parties until after the transaction in question had been completed in good faith. . . ." (*Burns v. Grable, supra*; 138 Cal. App. 2d 280, 287-288.)

Appellants urge that the fact that the property sold to Burns et ux. was acquired by the trustees after the creation of the trust whereas the properties sold herein were properties originally conveyed by the trustor to trustees differentiates *Burns v. Grable* from the case at bar. The claimed distinction is of no import nor consequence.

The decision clearly holds that the trustees, for the 25-year interim term, were invested with the power to sell and convey real property for the purpose of building up the trust and of carrying out the severable spendthrift trust provisions of the trust. Obviously such power is not and cannot be limited to sales and conveyances of after-acquired properties. The decision does not so hold; and, in fact, it clearly indicates that the only possible invalidity of the trust consists in the separable provisions with reference to the distribution of the remainder.

The decisions in *Burns v. Grable*, therefore, conclusively determined the power and right of the trustees to sell and convey properties of the trust; and said decision is *res judicata* herein. Accordingly, it is unnecessary to consider other collateral, nonessential points discussed in the briefs. Reference is, however, made to the further discussion of the matter set forth in *Burns v. Grable, supra*, 138 Cal. App. 2d 280, 288-289, and in *Grable v. Citizens Nat. Trust & Sav. Bank, supra*, 164 Cal. App. 2d 710, 713.

The judgment is affirmed.

KINCAID, *J. pro tempore.*

We concur:

FOX, *P. J.*

ASHBURN, *J.*

APPENDIX B.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Fourth Appellate District.

F. L. Burns and Laura B. Burns, Plaintiffs and Respondents, vs. Donald L. Grable, individually and as administrator with the Will annexed of the Estate of Sidney L. Beach, deceased, G. W. Grable and Louise Grable, husband and wife, individually and as trustees of the Sidney L. Beach Trust, *et al.*, Defendants and Appellants Civil No. 5241.

Filed January 4, 1956.

Appeal from a decree of the Superior Court of San Bernardino County in a quiet title action. Archie D. Mitchell, Judge. Affirmed.

For Appellant Administrator—Russell H. Reay.

For Appellants Grable, individually and as trustees—G. W. Grable and Louise Grable, in propria persona.

For Respondents—F. W. Audrain and S. Rex Lewis.

Plaintiffs and respondents, F. L. Burns and wife brought this action against defendants and appellants Donald L. Grable, individually and as administrator of the estate of Sidney L. Beach, deceased, and G. W. Grable and Louise Grable, husband and wife, individually and as trustees of the Sidney L. Beach trust, to quiet title to two lots in San Bernardino County, and allege that they were the owners and in possession thereof and that defendants and appellants claim some right, title and interest therein. The prayer is that it be adjudged and decreed that plaintiffs are the owners thereof; that their title is good and valid and that defendants

be barred from asserting any title thereto. There is a general prayer for equitable relief.

Defendant Donald L. Grable, individually and as administrator, filed a separate answer, denied generally the allegations of the complaint, and as a separate defense alleged that one Sidney L. Beach was the owner of the described property and that by his demise his estate became the owner thereof and that the property was then being held by defendants G. W. Grable and wife as trustees of said Sidney L. Beach trust; that said trustees under said trust conveyed this property by grant deed to plaintiffs herein in violation of its terms and without right or authority, and that plaintiffs were fully aware of this fact. In conjunction therewith they filed a cross-complaint against plaintiffs and G. W. Grable and Louise Grable, as trustees, alleging these facts and claim that plaintiffs hold title to said property only as involuntary trustee for the estate of Sidney L. Beach, deceased. The prayer is that it be so declared and that plaintiffs be compelled to reconvey the property to said estate and to quiet title against plaintiffs.

Defendants G. W. Grable and Louise Grable, by answer to the cross-complaint, deny that they ever were trustees of said trust, because said trust was invalid. Accordingly they claim that they had no authority to transfer said property to the plaintiffs and were therefore resulting trustees only for the estate of Sidney L. Beach; that the trust instrument was recorded in San Bernardino County in 1950, and plaintiffs took such property with full notice of the invalidity of the trust. They pray that title to said property be transferred to them as such resulting trustees. By way of cross-complaint they allege that cross-defendant Security Title In-

surance Company insured plaintiffs as beneficiaries in a title policy in the sum of $12,500, the sale price of the property; that since the title to the property in plaintiffs is invalid that it be decreed said resulting trustees be declared to be beneficiaries thereunder; and that judgment be entered in their favor against said title company for $12,500.

By way of answer to this cross-complaint it is alleged by plaintiffs that the trustees are estopped from denying plaintiffs' title to said property and from claiming that title thereto did not pass to plaintiffs by virtue of their grant deed. In answer to the cross-complaint of Donald L. Grable, individually and as administrator, plaintiffs allege that he is barred from asserting any defense to this action by reason of the statute of limitations (Sec. 338, par. 4, Code Civ. Proc.) and that he is estopped from denying the authority of the trustees to perform acts under the said trust for several reasons and particularly because he ratified previous acts of the trustees and accordingly may not disaffirm certain acts unfavorable, and ratify others which are favorable to said trust estate.

On August 27, 1954, the court denied a motion of the trustees for judgment on the pleadings. On December 29, 1954, G. W. Grable filed an affidavit in support of his oral motion to abate the action predicated upon the ground that Sidney L. Beach on June 5, 1952, filed an action in the Superior Court of Los Angeles County in which he sought declaratory relief as to whether a written trust created by him was valid or invalid, and for an accounting of the trustees, if it was held to be invalid. It is averred that G. W. Grable, his wife and the beneficiaries under the trust were joined as parties in said

action; that after the hearing, the trial court signed a memorandum of its ruling stating that "The court is prepared to hold that the trust involved is invalid for the reason that it violates the rule against perpetuities . . . The trust will therefore be dissolved and defendant trustees ordered to make accounting." Before this decision Beach died. Grable was appointed administrator, and was substituted in said action.

On December 30, 1954 this action came on for trial and the judge granted a motion of attorney Reay, to "abate the cross-complaint pending determination upon further action." (The effect of this order is not clear to us.) The further trial of the action was continued to January 6, 1955, and at that time defendant G. W. Grable testified under section 2055 of the Code of Civil Procedure. Certified copies of the declaration of trust, grant deed, escrow instructions, and other documents were received in evidence without passing judgment on their validity. A grant deed dated September 13, 1940, was received in evidence as defendant Donald Grable's exhibit. Other witnesses were called by plaintiffs and after certain stipulations of fact between counsel, plaintiffs rested their case. Some confusion exists as to whether defendants and appellants then submitted the entire case for decision or were, as claimed by the appellants for the first time in their briefs on appeal, merely presenting a motion for nonsuit and later expected to produce further evidence. Before proceeding further we will set forth the record pertaining to the motion after plaintiffs rested their case. The reporter's transcript reflects the following dialogue between the court and counsel for defendants and appellants, and G. W. Grable and his wife, who were then and at all times appearing in propria persona.

"Mr. Reay: Your Honor, I don't believe that the defendant administrator has any evidence to introduce. I believe it is just a question of the legality of the documents before this Court, so I am going to move for a judgment on behalf of the defendant administrator. I am willing to submit that, Your Honor.

"Mr. Grable: I agree with that, Your Honor.

"The Court: Very well, do you make the same motion?

"Mr. Grable: Yes, sir.

"The Court: . . . I may have involved him in something he didn't intend. You make the same motion on behalf of yourself, is that it?

"Mr. Grable: Yes.

"The Court: Rather than—a motion was made by Mr. Reay with respect to the administrator and now you are making the motion with respect to yourself?

"Mr. Grable: That is correct.

"The Court: And your wife too; is she a party?

"Mr. Grable: Yes, that is correct.

"The Court: Very well.

"Mr. Reay: May I also make a motion for non-suit too—I think that would better protect the rights of the plaintiff, whatever equities the plaintiff might have in this case. I think we would prefer to make a motion for non-suit, Your Honor.

"The Court: Very well.

"Mr. Reay: I might make a previous statement with the remark, Your Honor, I believe there is equities in this case, but I do not believe the plaintiff has filed the proper proceedings before this Court to get those equities before Your Honor, and I would change to a motion for the non-suit.

"The Court: Very well. You want to make the same Motion, Mr. Grable?

"Mr. Grable: Yes, the same motion."

Thereafter, briefs were submitted and on February 17, 1955, a minute entry was made: "In the above entitled action, heretofore submitted, the court now makes the following ruling and written opinion: Judgment for plaintiff." There was no direct statement in the record that the trial judge ruled on the motion for nonsuit. However, the inference must be that he denied it because he filed a written memorandum opinion on February 17, 1955, setting forth in general terms his reason for entering judgment for plaintiffs quieting their title to the property. Otherwise, had a judgment of nonsuit or dismissal been granted in favor of defendants no such findings would have been necessary. (9 Cal. Jur. p. 565, Sec. 40.) On March 4, 1955, he signed written findings reciting that the "cause" came for "trial" on January 6, 1955, and the parties were personally present or represented by counsel; that "trial" of the cause was "duly had and evidence both oral and documentary was received, and all things having been duly presented to the court, the court now makes the following findings of fact." Thereafter, the court concluded that plaintiffs were the owners of the property and defendants had no right to it. A decree was entered accordingly. Defendants appeal from the decree. No motion for new trial was made and apparently no objections were made in the trial court whereby the trial judge's attention might have been called to the claim which appellants now make for the first time on appeal that the trial judge was only ruling on motion for nonsuit. Obviously objections to failure of the court to [illegible] of the trial should not be urged for the

first time on appeal. (Hession vs. City and County of San Francisco 122 Cal. App. 2d 592, 605.) From the record it might well be understood that the trial court believed, as stated by counsel and acquiesced in by defendants, that even though the nonsuit should not be granted, the parties had no further evidence to offer, and that "It is just a question of the legality of the documents before this court."

The facts shown were that G. W. Grable and Louise Grable were appointed trustees in a declaration of trust dated September 15, 1949, and recorded in San Bernardino County February 20, 1950; that on April 5, 1950, while they were acting as trustees under the Sidney L. Beach trust, they purported to purchase the herein concerned real property from one Clark and wife naming the "Sidney L. Beach Trust" therein as grantee; that at that time they, as trustees, executed a purchase money deed of trust in favor of the Clarks in the sum of $11,000; that they, as trustees then purported to sell that real property to the plaintiffs by grant deed for the sum of $12,500; and that $11,319.81 of this money was used to pay the balance due on the purchase money deed of trust from the escrow involved in this transaction. It also appears that when the validity of the trust and accordingly the grant deed involved herein arose, plaintiffs to protect their record title also obtained a quitclaim deed from the Clarks, predicated upon the claim that the Sidney L. Beach trust was invalid and no authority was in the trustees to convey the property there involved, there was likewise no authority in said trustees to execute and record the grant under the Clark grant deed, and accordingly, that deed being void, plaintiffs acquired title from the Clarks under this quitclaim deed.

Defendants further contend that the trust agreement conclusively shows, upon its face, that it is invalid for the reasons expressed; that the trustees thereunder were, accordingly, without power or authority to execute the grant deed here involved and that under the decisions it was void; that a resulting trust is presumed; that by recording of the trust agreement, as alleged, plaintiffs had constructive notice of its invalidity; that Grables had a vested right to the money due on the policy of title insurance; that the Los Angeles court, under the county rule, was vested with exclusive jurisdiction to determine in that action the rights of all parties involved pertaining to the validity of the trust; and that the defense of estoppel is not applicable under the facts existing. In support of these contentions they cite such authorities as Frink v. Roe, 70 Cal. 296, 313, secs. 1213 and 2213 Civil Code; 14 Cal. Jur. p. 531, sec. 80; Cutting v. Bevan, 206 Cal. 254; Wood v. American National [illegible], 125 Cal. App. 2d [illegible] and 41 Am. Jur. p. 107, sec. 63.

G. W. Grable testified that all of his acts in dealing [illegible] were performed in good faith and were based on the assumption that he had full authority to perform [illegible] and to sell the real property herein described. Plaintiffs were of the same belief and were [illegible] a considerable sum in [illegible].

[illegible] contend generally that plaintiffs were the owners and in possession of the property, [illegible] some title thereto adverse to [illegible] and claims are groundless and without [illegible] defendants $12,500 for [illegible] good faith and

plaintiffs took possession of the land and improved it that defendants now seek to deprive the plaintiffs of said land through a court of equity without offering to do equity, and that Sidney L. Beach created the situation of which he now, through his personal representative, seeks to take advantage to the detriment of those who in good faith parted with $12,500. Defendants were barred from ever asserting any claim to it.

It is not clear from the findings upon what basis or theory the court quieted plaintiffs' title to the property in question. The contention of the Sidney L. Beach trust was lacking in merit as to become a grantee under the Clark deed as contended by defendants, then plaintiffs' title under the quit claim deed from the Clarks was sufficient to support the judgment. In this connection see Kessler v. Eldred, 206 N. Y. 84, 99 N. E. 165, where it was said that "a deed to a corporation which has not the statutory power is capable of being ratified by the corporation named in the deed, and the general rule also is that to make a deed effective the grantee must be a person either natural or artificial, capable of taking and holding the property . . ." See also Stewart v. Ely, 81 Ill. 568.

It might appear from the briefing that the validity and effect of the grant deed from the trustee under the will [illegible] upon the theory that the deed was void because of the rule of perpetuity.

the benefit of Mrs. Louise Grable, 51 per cent, or in case of her death to be distributed according to her will or to her heirs in case no will was left; (B) 49 per cent to be divided between the children of Louise Grable, after they became 25 years of age, with right of representation. It then provides that at the end of 25 years the trust shall cease and the trust estate shall be distributed to a Sidney L. Beach Corporation to be subsequently formed and stock issued to the beneficiaries as follows: 51 per cent to Louise Grable, if living, and if not to certain other persons; 49 per cent to her then living children and to the issue of any deceased child by right of representation.

It does not affirmatively appear that the ruling of the trial court in the Los Angeles action is anything final, judgment disposing of the claim here presented. Accordingly, proof would be subject to a final determination of the question presented in this action. Plaintiffs here were not parties to that action and were not necessarily bound by the memorandum opinion.

At the time of the creation of the trust Sidney L. Beach owned considerable real property in said trust. The trustees by the terms of the trust were to accumulate an income trust fund and pay taxes and assessments on the property and also pay hospital and medical expenses of certain beneficiaries from that source. The real property here in question was subsequently purchased by the trustees and was soon thereafter sold by them to enable the purpose of "building up" the trust fund from which the distributions were to be subsequently made. There are many California cases upholding the [illegible] of the trust estate regardless of the in[illegible] Duty bear particularly

around the fact of the spendthrift character of the trust and the courts generally find that the valid portions will be disturbed only if the elimination of the invalid provisions will defeat the entire purpose of the trust. (Estate of Troy, 214 Cal. 53; Estate of Gardiner, 45 Cal. App. 2d 559; Estate of Mc Inerti, 24 Cal. 2d 904; Otto v. Union National Bank, 38 Cal. 2d 233.)

The facts here reveal and these cases support the proposition that the Sidney L. Beach trust was, in any event, valid at the time of the execution of the grant deed in question. It authorized the trustees, for the 25 year term, to buy and sell real property for the purpose of building up the trust, and in carrying out the spendthrift trust income provisions which are severable from the future disposition clauses. The profit from the sale of the property here in question became an interim estate of the trust and was distributable under the provisions which at the time were considered valid by all parties. The invalidity, if any, was discovered later and consisted of certain separable provisions in reference to the distribution of the remainder upon the happening of certain events or failure of such events to happen, and these claimed invalidities were not discovered by the parties until after the transaction in question had been completed in good faith. The trust received and retained the benefits of the full amount of the purchase price and plaintiffs had been put in possession and had occupied and used the property as their own property before the trustees ever questioned the validity of the transaction.

It is the rule that no agreement of the parties and no [illegible] as a result of the creation or management of an illegal trust estate which is prohibited by

law. But there is authority for the statement that one may become estopped to question the acts of the past done with his consent as in the expenditure or distribution of trust funds or, under the doctrine of *res judicata*, may have questions conclusively determines against him or by deed or transfer, or the like, may surrender all interest in property affected so as to have no standing to litigate anything in reference to it. (41 Am. Jur. 107, sec. 65; Perpetuities and Restraints on Alienation, 70 C. J. S. 684, sec. 81.) See 162 A. L. R. pp. 102-103, where it is said: "Certain cases serve to emphasize the important difference between questioning past distributions of property or money, acquiesced in, and contesting limitations for the future." It is quoted from a cited case and said: "The substance of the ruling seems to be that the residuary legatee could not question what from time to time had been done, with his acquiescence, in the distribution of income, although upon his discovery of the invalidity of the trust, and prior to its validity or invalidity having been determined, he could question the trust as to further acts of the trustees.

From our research it appears that the California courts have not had occasion to directly apply the doctrine of estoppel as to past acts in relation to such trustees. However, the cases are numerous where the estoppel doctrine has been applied in analogous cases. See last quoted and trust situations mentioned in 25 Cal. Jur. 210, sec. 84, where it speaks of comparative knowledge as the basis of responsibility:

"The evidence showing, in a suit to enforce the trust against the transferee, that the subject matter of the trust was transferred by the trustee to the defendants

for a valuable consideration, and hence that loss must be borne by one of the parties, the situation permits of and requires an application of the fundamental rule which declares that where one of two more or less innocent parties must suffer a loss, the loss shall be borne by the party who had the better opportunity to foresee the dilemma and to prevent it from arising. . . ." (See also Crittenden v. McCloud, 106 Cal. App. 2d 42, 49.)

It appears to us that this is a situation where all the parties concerned may have innocently committed some error, if any error was committed, which alleged error was that, as a matter of law, the Sidney L. Beach trust violated, to some extent, the rule against perpetuities; that Beach created the trust ostensibly intending to create a valid trust and to clothe the trustees with the power of sale; that plaintiffs relied upon Beach's creation and accordingly Beach or his trust should not be permitted to profit through the alleged mistake of law he made into which alleged mistake of law he had led the plaintiffs. No offer to return the purchase price is indicated. *A fortiori* the trustees have no legal or equitable grounds to deny the plaintiffs' title.

The record does not expressly show that the trial judge ruled on G. W. Grable's oral motion to abate the action due to the filing of the previous action in Los Angeles County. Suffice it to say plaintiffs here were not made parties to that action and under the reasoning here indicated plaintiffs were entitled to proceed with the present action without violating any comity rule. No prejudicial error resulted in this respect.

The court's ruling in granting attorney Reay's motion to "abate the cross-complaint pending determination upon further action" has confused us as to its ef-

fect. Assuming it refers to cross-complaint of Donald L. Grable, as administrator, against plaintiffs and cross-defendants G. W. Grable and wife, as trustees, and assuming that the order only deferred consideration of it until the rights of plaintiffs had been determined in the present action, it must be presumed, in support of the judgments entered, that the court fully considered the cross-complaint, and found against cross-complainants and in plaintiffs' favor in respect to the issue presented. Its prayer was that it be declared that plaintiffs and cross-defendants hold title to the property only in trust for the estate and to have cross-complainants' title quieted accordingly.

It is true that the findings do not directly dispose of the issues presented by G. W. Grable's cross-complaint in which the Security Title Insurance Company is made a party defendant and in which cross-complainants claim they, as trustees, were entitled to $12,500 on the policy of title insurance issued to plaintiffs, because of the alleged invalidity of the title. Since the finding that the title was not invalid is sufficiently supported by the evidence, no relief could have been given in their favor on the cross-complaint. No prejudicial error resulted.

Decree affirmed.

GRIFFIN.

We concur:

BARNARD, *P. J.*

MUSSELL, *J.*

APPENDIX C.

In the Superior Court of the State of California, in and for the County of Los Angeles.

Sidney L. Beach, Plaintiff, vs. G. W. Grable, Louise Grable, as Trustees under the Sidney L. Beach Trust, *et al.*, Cross-Complainants, vs. Sidney L. Beach, Cross-Defendant. No. 600,136.

Memo of Ruling.

Demurrer to amended cross-complaint sustained. Counsel for cross-complainant having indicated to the court that he cannot amend further, said demurrer is sustained without leave to amend.

On the issue heretofore submitted, the court is now prepared to hold that the trust involved is invalid for the reason that it violates the rule against perpetuities. The trust will therefore be dissolved and defendant trustees ordered to make accounting.

The matter of the accounting and further proceedings will be set for hearing at the convenience of counsel or upon 5 days notice.

Dated: November 2, 1953.

ARTHUR CRUM,

Judge.

APPENDIX D.

In the Superior Court of the State of California, In and For The County of Los Angeles, Dept. 18.

Court convened at 9:15 A.M., November 3, 1953; Presiding, Hon. Arthur Crum, Judge; William A. Goodwin, Deputy County Clerk; C. G. Lindeman, Deputy Sheriff; C. M. Stewart, Reporter, and the following proceedings were had:

Sidney L. Beach, 600130, vs. G. W. Grable, *et al.*

Plaintiff's demurrer to the cross-complaint heretofore submitted, October 30, 1953, the court now files its memorandum of decision and order: Demurrer to amended cross-complaint sustained. Counsel for cross-complainant having indicated to the court that he cannot amend further, said demurrer is sustained without leave to amend. On the issue heretofore submitted, the court is now prepared to hold that the trust involved is invalid for the reason that it violates the rule against perpetuities. The trust will therefore be dissolved and defendant trustees ordered to make accounting. The matter of the accounting and further proceedings will be set for hearing at the convenience of counsel or upon five days notice. Counsel notified.

The above minute order is true and correct.

WILLIAM A. GOODWIN.